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MICHAEL RODA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1640

EMMETT C. WORLEY,

Petitioner,

v.

COLUMBIA GAS OF KENTUCKY, INC., KENTUCKY GAS TRANSMISSION CORP., MUTUAL PIPELINE CONTRACTORS, INC., JOHN T. DIX and CHESTER NOWICKE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION ON BEHALF OF COLUMBIA GAS OF KENTUCKY, INC., AND KENTUCKY GAS TRANSMISSION CORPORATION, TWO OF THE RESPONDENTS

Of Counsel

THOMAS E. MORGAN
H. RAYMOND ANDREWS, JR.
Post Office Box 1273
Charleston, West Virginia
25325

May 30, 1974

JOSEPH L. ARNOLD
First National Bank & Trust
Company Building
Lexington, Kentucky 40507

Counsel For
Columbia Gas of Kentucky, Inc.
and
Kentucky Gas Transmission
Corporation

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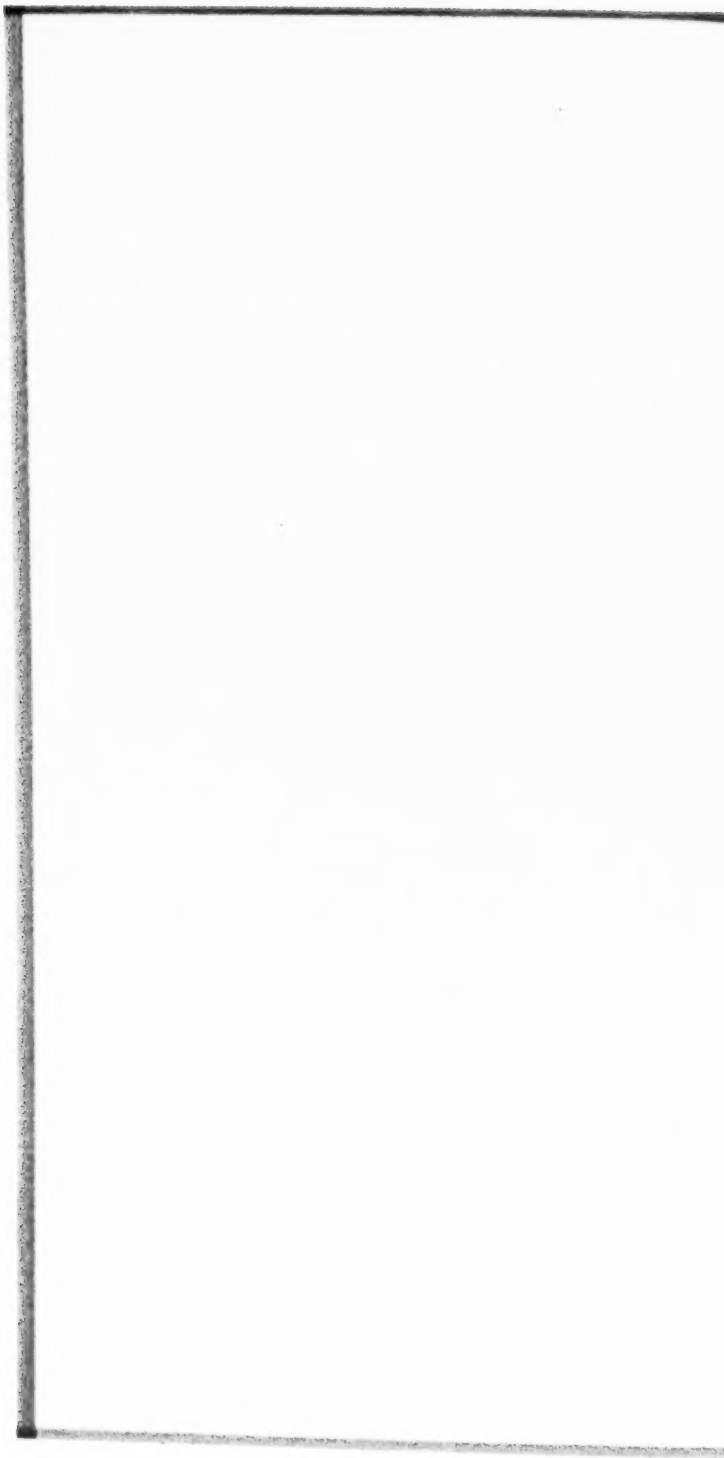

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Columbia Gas of Kentucky, Inc., and Kentucky Gas Transmission Corporation, two of the Respondents herein, respectfully pray that this Court deny Petitioner's petition for a writ of certiorari.

OPINION BELOW

The opinion of the Court of Appeals is reported at 491 F.2d 256 and is appended to Petitioner's petition at pages 1a through 23a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 27, 1973. A timely petition for rehearing *en banc* was denied on February 1, 1974. Petitioner in his petition asserts the invoking of this Court's jurisdiction under 28 U.S.C. 1254(1). Petitioner's petition for a writ of certiorari was docketed by the Clerk of this Court on May 1, 1974.

QUESTIONS PRESENTED

Petitioner failed to present to this Court a statement of the questions presented for review as required by Rule 23(1)(c) of this Court's Rules adopted June 15, 1970, effective July 1, 1970.

These Respondents respectfully submit that the questions attempted to be presented to this Court appear to be:

1. Was Petitioner deprived of a Constitutional right to trial by jury by the action of the Court of Appeals?
2. Is the opinion of the Court of Appeals based upon such an incomplete record that a substantial Federal question is presented?
3. Is the opinion of the Court of Appeals in conflict with its own and other prior opinions?

CONSTITUTIONAL PROVISIONS

This case involves no Constitutional provision, treaty, statute, ordinance or regulation; Petitioner's petition asserts (pp. 8-10), however, that the Seventh Amendment to the Constitution of the United States is involved. That Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[1]

STATEMENT OF THE CASE

Petitioner instituted his civil action against all Respondents before the United States District Court for the Eastern District of Kentucky. The jurisdiction of the District Court was invoked because of diversity of citizenship, Petitioner at the time of the institution of his action being a citizen of Texas, while Respondents were citizens of Kentucky or Delaware.

The fundamental issue presented to the District Court and on appeal to the Court of Appeals was whether the evidence could support a finding that one or more of these Respondents conspired with other Respondents to maliciously prosecute Petitioner to his damage. The District Court held: "Yes"; but, on appeal, the Court of Appeals held: "No."

All facts pertinent to this issue are accurately and completely stated by Circuit Judge Weick in the opinion of the Court of Appeals (Appendix to the

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[1] Petitioner's Table of Authorities (p. iii) quotes the Eighth Amendment, but without later explanation or argument.

petition at 3a-8a; 491 F.2d at 258-260). These Respondents adopt Judge Weick's statement of the case as their own and will not repeat it herein.

Counsel for these Respondents will not impose upon this Court's time to point out the multitude of inaccuracies, irrelevancies and incomplete statements contained in Petitioner's statement of the case, since they are self-evident, particularly when read in light of the opinion of the Court of Appeals. One thing is certain: where the petition conflicts with the appellate opinion, the petition misstates the facts.

ARGUMENT

Petitioner fails to set forth and support any ground whatever which would call for this Court to exercise its discretion to grant a writ of certiorari to review the decision of the Sixth Circuit Court of Appeals. Rule 19; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1954). Counsel for these Respondents will hereinafter refute each of the three "reasons" presented by Petitioner, dealing first (I A and I B, below) with Petitioner's numbers I and III, which represent an unsuccessful effort to show "an important question of federal law" under Rule 19(1)(b). Thus, Petitioner's "reason" numbered II is dealt with last.

I.

THERE IS NO "IMPORTANT QUESTION OF FEDERAL LAW"

A. Petitioner was not deprived of trial by jury in contravention of the Seventh Amendment to the Constitution of the United States.

Petitioner asserts erroneously that the Court of Appeals by its opinion precluded Petitioner from enjoying his Constitutional right to trial by jury, relying on the Seventh Amendment to the Constitution of the United States.

This Court has previously considered this very argument in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, *reh. denied* 386 U.S. 1027 (1967), in which the appellant asserted that the overturning by the Tenth Circuit Court of Appeals of a jury verdict was, *inter alia*, a violation of the plaintiff's right to a trial by jury guaranteed by the Seventh Amendment. This Court affirmed the Court of Appeals, on the following premises:

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n. o. v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n. o. v. See Baltimore & Carolina Line, Inc. v. Redman, supra. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n. o. v. on appeal. Section 2106 of Title 28 provides that, 'The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order

of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.'" (386 U.S. at 322.)

Petitioner cites, in support of his theory, the case of *Lynn v. Smith*, 281 F.2d 501 (3rd Cir. 1960). This case dealt with a dispute between plaintiff and the Village of Pittsfield, Pennsylvania, concerning the ownership of a small tract of land used as a park, upon or near which the Village placed a bench. The plaintiff removed and destroyed the bench, claiming it was on his land, and was arrested for destruction of public property. He later brought a civil action for malicious prosecution, which the trial court dismissed on the ground the Village had acted on advice of counsel. The Court of Appeals for the Third Circuit reversed, holding only that the questions of counsel's advice and the good faith of the Village were evidentiary issues to be presented to a jury under Pennsylvania law.

But neither *Lynn v. Smith*, nor any other malicious prosecution case, abolishes the judicial duty to require jury verdicts to rest on evidence, in Pennsylvania or anywhere else.[2] *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163 (E.D.Pa. 1971). Thus *Lynn v. Smith* in no

[2] In the instant case, pursuant to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the Court of Appeals properly considered the controlling Kentucky law. It is worth noting that prior to Erie, when a Federal common law was developing, this Court in Brown v. Selfridge, 224 U.S. 189 (1912), held in a malicious prosecution case that where there was a failure to adduce proof of the facts necessary to establish lack of probable cause, there was no error in taking the case from the jury. This decision is entirely consistent with the law of Kentucky, with which the Court of Appeals was concerned in its review of this case on appeal.

way establishes a criterion to be urged as a basis for this Court to exercise its discretion and grant a writ of certiorari.

B. The Decision of the Court of Appeals is not in conflict with its own previous decisions.[3]

Petitioner cites and quotes from the case of *Smoot v. Fox*, 353 F.2d 830 (6th Cir. 1965), *cert. denied* 384 U.S. 909, *reh. denied* 384 U.S. 958 (1966), as the sole support for his contention that the Court of Appeals in the instant case is in conflict with its own prior decisions. The facts of the *Smoot* case do not bear out Petitioner's theory. The case involved a petition for a writ of prohibition against the Judge of the United States District Court for the Western District of Michigan. Plaintiff instituted a libel suit against the League of Women Voters, but later found it prudent to obtain an order of dismissal with prejudice at his costs. The defendants moved the trial court to hold a hearing to establish their costs, indicating that they were prepared to present at the hearing their entire defense to the dismissed action. The trial court accepted this approach, and the plaintiff sought and was granted a writ of prohibition against such unprecedented hearings on costs. As the Court of Appeals noted,

> "In essence, defendants would convert a proceeding to assess costs into an action for damages for malicious prosecution of a civil action, and have the Court, instead of a jury, award the damages." (353 F.2d at 832.)

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[3]While the petition formally asserts in "reason" III a conflict with other circuits, Petitioner limits his argument to a discussion of a single Sixth Circuit opinion (Petition at 12).

In this context, Chief Judge Weick commented that malicious prosecution cases, like other forms of action at common law, are to be determined by jury trials (353 F.2d at 833); but this truism is hardly germane to the issue now at bar.

Petitioner's is not the first Kentucky case charging malicious prosecution to come before the Court of Appeals. In *Taylor v. Shepherd*, 391 F.2d 263 (6th Cir. 1968), the Court of Appeals considered the defendant's appeal of a case from the same trial court which tried the instant case. As here, the District Court left to the jury the decision on the effect of advice of counsel. As here, the Court of Appeals held that, under Kentucky law, advice of counsel was a complete defense to a claim of malicious prosecution, vacated the judgment, and remanded the case with directions to enter judgment for the defendant.

Thus if consistency is the issue, the Petition must be denied.

C. Petitioner failed to raise any federal question insofar as the decision of the Court of Appeals relates to these particular respondents.

Insofar as these Respondents are concerned, the Court of Appeals upheld their innocence on grounds entirely independent and apart from those questioned by Petitioner.

As to Respondent Columbia Gas of Kentucky, Inc., the Court of Appeals concluded that "there is not even a scintilla of evidence" to sustain a judgment against it, and held, "The District Court erred in denying its motion for a directed verdict." (Appendix to the Petition, 8a; 491 F.2d at 260.) In his petition, Petitioner does not question that holding.

As to Respondent Kentucky Gas Transmission Corporation, the Court of Appeals held that there was "*no* proof that" its employee "had actual or apparent authority * * * to prosecute" Petitioner, and "*no* evidence that any affidavits for the arrest * * * were induced by or resulted from" its employee. (Appendix to the Petition, 8a, 9a; 491 F.2d at 260, 261. Emphasis supplied.) Petitioner does not mention these conclusions of the Court of Appeals; and clearly, agency is a question of state law, does not present a Federal question, and should not be reviewed by this Court. *Otis v. Oregon Steamship Co.*, 116 U.S. 548 (1886).

As these matters were not raised by Petitioner, the decision of the Court of Appeals cannot be disturbed. Rule 23(1)(c); and see *Andrews v. Louisville & N.R.R.*, 406 U.S. 320, 324-325 (1972):

> "The * * * issue discussed in the dissent was not set forth as a 'question presented for review' in the petition for certiorari, and therefore our Rule 23(1)(c) precludes our consideration of it."

II.

THE ASSERTION OF AN INCOMPLETE RECORD IS TOTALLY WITHOUT FOUNDATION, AND OTHERWISE NOT SUITABLE FOR CONSIDERATION IN A PETITION FOR WRIT OF CERTIORARI

The effect of Petitioner's "reason" numbered II is to assert (Appendix to the Petition at 27a) that five transcript pages are missing (out of 2245 pages), which *may* have caused the Court of Appeals to reach an erroneous decision. While this argument is without the slightest substance, a brief response is appropriate.

The facts concerning a supposed deficient record are misstated in the petition and in the appended letters.

In the first place, of the five numbered pages claimed to be missing (*i.e.*, 1027, 1307, 1388, 1547 and 1548), the three-volume appendix filed by these Respondents with the Sixth Circuit Clerk's office contains pages numbered 1027 and 1388.

As to the remaining three pages (*i.e.*, 1307, 1547, and 1548), a reading of the official transcript reveals that only a misnumbering occurred, and that no pages are in fact missing.[4]

Furthermore, Petitioner's "reason" numbered II comes too late even if the facts supported it. Petitioner should have, and clearly would have, raised this aspect of the case before the Court of Appeals if the point had any basis in fact. It cannot be raised at this late date. *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971).

Moreover, the point as raised by Petitioner in his "reason" numbered II does not meet any of the standards of Rule 19.

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[4] Appended hereto is an affidavit from the Official Court Reporter establishing that no pages are in fact missing but that an inadvertent misnumbering occurred.

CONCLUSION

Counsel for Respondents, Columbia Gas of Kentucky, Inc., and Kentucky Gas Transmission Corporation, respectfully submit that the decision of the Sixth Circuit Court of Appeals in this case is clearly correct, and that Petitioner has failed to raise any ground for this Court to exercise its discretion to grant a review of the opinion below on writ of certiorari. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH L. ARNOLD
First National Bank & Trust
Company Building
Lexington, Kentucky 40507

Counsel for Respondents
Columbia Gas of Kentucky, Inc.,
and
Kentucky Gas Transmission
Corporation

Of Counsel

THOMAS E. MORGAN
H. RAYMOND ANDREWS, JR.
Post Office Box 1273
Charleston, West Virginia 25325

May 30, 1974

APPENDIX

A F F I D A V I T

COMMONWEALTH OF KENTUCKY,
COUNTY OF FAYETTE, TO WIT:

I, Ella G. McGarvey, Official Reporter, United States District Court, Eastern and Western Districts, do hereby certify that the transcript of all the evidence introduced and heard, or offered to be introduced and rejected, and all objections concerning the same, as well as a description of all papers or documents offered to be used as evidence in Civil Action No. 2186, Emmett C. Worley v. Columbia Gas of Kentucky, Inc., Kentucky Gas Transmission Corporation, Mutual Pipeline Contractors, Inc., John T. Dix and Chester Nowicke, when tried in the United States District Court for the Eastern District of Kentucky, at Lexington, January 25 through February 14, 1972, before His Honor, Mac Swinford, Judge of Said Court, was prepared by me or under my supervision; that through inadvertence certain pages were misnumbered; that page 1306 is succeeded directly by page 1308, there being no page numbered 1307; and that page 1546 is succeeded directly by page 1549, there being no pages numbered 1547 and 1548.

IN WITNESS WHEREOF, witness my official hand as reporter aforesaid, this the 21st day of May, 1974.

Ella G. McGarvey
Official Reporter

Subscribed and sworn to by Ella G. McGarvey, Official Reporter, United States District Court, Eastern and Western Districts, this 21 day of May, 1974, before me a Notary Public in and for Fayette County, Kentucky.

My commission expires May 14, 1977.

Mary Alice Green
Notary Public, ~~Fayette~~ State of ~~County~~, Kentucky

(Notarial Seal)